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You Are the Father! Untangling Custody Rights in Tennessee Between Unmarried Parents

By Miles Mason, Sr.

Although the legal concepts of child custody are usually straightforward, for unmarried parents, the execution is complicated because every parent presents unique concerns. The first step in embracing child custody and child support is to prove parentage. Only by proving paternity will the father obtain standing to sue for custody.

The process works like this:

1. Genetic testing proves the man is the biological father.
2. The biological father is named on the child's birth certificate.
3. Paternity is established according to law.
4. The man is declared the legal father.
5. The legal father sues for custody or visitation.
6. The court determines custody.
7. The court establishes child support.

This list is deceptively short, though, so be prepared for multiple twists and turns along the way.

SCIENTIFIC EVIDENCE OF PARENTAGE

With unwed parents, genetic testing provides biological certainty. As with drug or alcohol testing, irregularities in sample collection, chain of custody or paternity lab analysis sometimes arise. When possible, order two paternity tests. If DNA test results conflict, then get a third test.¹

Prenatal DNA Testing

Most people are familiar with swab DNA testing in which cells are collected by swabbing the inside of the cheek and sent to the lab for analysis. Blood testing the father and child is another option. Several DNA tests are possible during the mother's pregnancy:²

- **Blood:** Noninvasive prenatal testing in the first trimester can determine paternity. Fetal DNA circulating in the mother's blood is compared to the alleged father's DNA (cheek cell sample).
- **Amniocenteses:** Living cells from the fetus float in the amniotic fluid. Between the 15th and 20th week of pregnancy, a sample of amniotic fluid is drawn and tested. Fetal DNA is compared to the alleged father's DNA.
- **CVS:** Chorionic villus sampling is typically performed at 10 to 13 weeks when a tissue sample is taken from the placenta. Fetal DNA is compared to the alleged father's DNA.

With prenatal testing, the biological father has notice of the impending birth and shares prenatal, natal and postnatal expenses.

ESTABLISHING PATERNITY

All states require a determination of parentage before the putative father acquires parental rights. A man claiming to be the biological parent is a "putative father" or "alleged father," but he does not have parental or custodial rights until paternity is established — no exceptions. Genetic test results can show a 95% probability or better of paternity, but he still falls short of having a constitutionally protected fundamental right to parent the child.³ Only the legal father has standing to petition for custody with parenting time or visitation.⁴

The avenues open to a putative father not named on the birth certificate are:

1. Voluntary acknowledgement of paternity (VAP) with the mother;
2. Agreement to establish parentage with the mother and filed with the court (unless DNA testing is ordered *sua sponte*); or
3. Complaint to establish parentage with genetic testing.⁵

Because the VAP is simple, expedient and avoids court intervention,

it is very appealing to unwed parents. In fact, many clients postpone hiring an attorney for weeks, months or even years after acknowledging paternity.

ESTABLISH PATERNITY BY COURT ADJUDICATION

If the man rejects the VAP process, is unsure of paternity or flatly denies it, then a complaint to establish parentage may be filed by DHS, the mother, child, alleged father — by guardians if minors — until the child turns 21.⁶

Presumption of Paternity

A rebuttable presumption of paternity attaches if, absent exclusion,⁷ genetic test results show a 95% or greater statistical probability of parentage.⁸ On DNA evidence, temporary child support can be ordered.⁹ (Not a match? Look to test the next most likely candidate.)

In an involuntary or judicial parentage establishment case, DNA testing is ordered *sua sponte* or by party motion which will be granted.¹⁰ A second test may also be requested, paid for and ordered. And possibly a third!

There are only three outcomes:

1. Both tests exclude paternity. This is conclusive evidence of non-paternity. Case dismissed.¹¹
2. Both tests establish paternity. The presumption of paternity attaches.
3. One test excludes the man while the other establishes paternity. The court determines test accuracy between the two or orders a third test.

Once the presumption of paternity has attached, the putative father can raise an affirmative defense.

Rebut Presumption of Paternity

The putative father attempts to rebut paternity on motion with evidence of any of the following:¹²

1. He underwent sterilization before the period of conception or was medically incapable of conceiving a child during the probable period of conception; or
2. He did not have access to the mother during the probable period of conception (e.g., military deployment); or
3. He had an identical twin who had sex with the mother during the probable period of conception; or
4. His affidavit asserts another man had sex with the mother during the period of probable conception. In this instance, the court will order the other man submit to DNA testing.



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If the putative father successfully rebuts the presumption by clear and convincing evidence, then the case is set for bench trial. If he does not meet the burden of proof, then the court enters an order of parentage.

The order must include a determination of custody, of visitation or parental access, and child support. Support is retroactive to birth and complies with the Tennessee Child Support Guidelines. The order may address funeral expenses, protective orders and “[a]ny provision determined to be in the best interests of the child,” including the father’s request to change the child’s surname on the birth certificate.¹³

CHILD CUSTODY

Paternity establishment aside, asserting custody jurisdiction can be challenging for unmarried parents, based on where all parties reside. For the Tennessee court to determine custody, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) requires it have home state jurisdiction or temporary emergency jurisdiction of the child who is present in Tennessee.¹⁴

Presumption Unmarried Mother Has Full Custody

Start with the presumption that the “child born out of wedlock”¹⁵ is the mother’s legal offspring. She is presumed to have full custody

— physical and legal.¹⁶ Absent a court order to the contrary, she is the custodial parent (or primary residential parent) with sole legal decision-making authority.


What if she marries the natural father? The presumption of paternity legitimizes the child conceived out of wedlock but born after the parents marry. Likewise, a child conceived out of wedlock is legitimated when parents marry during the pregnancy but divorce before the birth.¹⁷

The legal father enjoys the same constitutional liberty interest as the mother in the “care, custody and control of their children.”¹⁸ He may seek joint or sole custody of the child born out of wedlock.

Rebuttable Presumption of Parentage with Marriage


There is yet another presumption. If the parties were married at some point in the 300 days preceding the birth, or were married when the child was born or conceived, then the husband or former husband is presumed to be the legal father and must be named on the birth certificate.¹⁹

For the husband’s name to never appear on the birth certificate, a certified copy of the divorce decree with negative DNA test results attached must be given to the hospital birth clerk. The decree must specify the husband is not the child’s biological father. Without it, he will not carry the burden of rebutting the presumption of



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parentage: his name will go on the birth certificate. At that point, he will need a court order to remove his name from the birth certificate so the biological father's name can be added and a corrected certificate generated.

Another issue with the 300-day rule has to do with the mother's refusal to provide information at the hospital. The only way to add the biological father to the birth certificate is to obtain a final court order stating, based on DNA evidence, the husband is not the biological father, with genetic test results attached to the order. This should rebut the presumption the husband or former husband is the legal father.

Joint Custody Arrangements

The court has authority to award joint custody to unmarried parents. But co-parenting arrangements in these cases are not without concern.²⁰ In the best interests of the child analysis, Tennessee courts tend to elevate sole custody over joint custody. Awarding sole physical custody to the primary residential parent (PRP) could avoid "disruption and instability" for the child. And awarding sole legal custody could avoid litigation from "unresolved conflict."²¹ Joint custody awards happen when parents exhibit the "cooperative spirit" essential to the arrangement.²²

Physical and Legal Custody

Custody is divided into physical and legal. The child's living arrangements fall under physical custody with one parent designated PRP. Legal custody is a parent's right to make decisions about the child's education, non-emergency health care, religious upbringing and extracurricular activities. The child's best interests are paramount.

The child of tender years is a best interests factor to consider between natural parents, but the antiquated "tender years presumption" favoring the mother is long gone. A parent's sex or gender is not a custody factor either.²³ If the mother is the primary caregiver of the young child, as is often the case, then she is better positioned to be the PRP with the father obtaining scheduled parenting time as the alternative residential parent. There are exceptions, and the circumstances matter.

Parenting Plan Agreement

The legal father can assert his right to a relationship with his child through custody proceedings. Unmarried parents, regardless of whether they live together, may enter into a parenting plan agreement after mediating legal decision-making authority, parenting time, vacation time, additional child support for extracurricular activities and so on.

When the relationship makes successful coparenting unlikely, the mother will have full custody (unless proven unfit) with the legal father obligated to pay child support as the noncustodial parent. He may or may not seek regular or supervised visitation. Any parent who chooses not to embrace a relationship with his offspring will still be ordered to provide monetary support.

Unmarried Parents' Child Custody Factors

Despite being unmarried, the legal father's rights should not be diminished by the custody analysis. Custody factors in *Tenn. Code Ann.* § 36-6-106 cannot be construed to affect or diminish the constitutional rights of either parent.²⁴⁴ Both parents should enjoy maximum participation in their child's life. All relevant factors matter.²⁵

PATERNITY FRAUD

With accurate genetic testing readily available at a reasonable cost (compared to 18 years of child support for another's offspring), opportunities for fraud should be minimal. Yet it happens. The VAP program could make it easier for the mother to misattribute paternity. She may merely suspect he is the father. Was misattribution intentional?

Paternity fraud is a common law tort action for the intentional or negligent misattribution of paternity (or misrepresentation regarding the biological father's identity). As a civil action, damages may be awarded based upon the mother's conduct amounting to intentional or negligent misrepresentation.

In *Hodge v. Craig*, for example, the former wife intentionally misrepresented the child's paternity to the former husband. He was awarded damages based on his "post-divorce payments of child support, medical expenses and insurance premiums..." (which were not an improper retroactive modification of child support), plus costs of appeal.

When fraud is suspected, consider the following options:

- **60 Days to Rescind:** The first opportunity to undo the VAP

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for any reason is to rescind in writing within 60 days.

- **Five-Year Limitations Period:** Within five years of executing the VAP, the man may petition to disestablish paternity and challenge the VAP based on “fraud, whether intrinsic or extrinsic, duress or material mistake of fact” and submit to DNA testing. Test results must exclude him from the statistical pool with less than 95% probability. Once paternity is disestablished, he may file a civil paternity fraud action against the mother for damages.
- **Outside the Five-Year Statute of Limitations (SOL):** The only legal basis after the five-year SOL is alleging the mother’s fraud in the procurement of the VAP. A court must find the requested relief “will not affect the interests of the child, the state or any Title IV-D agency.”

CHILD SUPPORT

With parentage established, the court will order child support. Unmarried parents have a co-equal duty to support their child. They go through the same support calculations as do divorced and separated parents. The monthly Basic Child Support Obligation (BCSO) is calculated using the same guidelines and the same worksheets. The BCSO is the starting point and includes consideration of child-rearing expenses mainly for housing, food, transportation, education and clothing.

When unmarried parents have a permanent parenting plan, their child support obligations will depend, in part, on parenting time arrangements and other plan details.

In paternity cases, child support is set from the child’s birth date in states that comply with Title IV-D of the SSA. Any paternity or legitimation order or VAP will include the biological father’s SSN to facilitate enforcement of child support orders.

Putative Father Registry

For the court to order child support, it must have personal jurisdiction over the noncustodial parent. For the non-resident putative father, long arm jurisdiction requires he have minimum contacts with Tennessee (to balance the burden on him and because of the state’s strong interest in having parents support their children).

In the Uniform Interstate Family Support Act (UIFSA), in personam jurisdiction over a non-resident parent includes, among other things, the man who “asserted parentage in the putative father registry maintained” by DCS. Registering serves as notice of intent to claim paternity of the child. (In the event of adoption proceedings, the man would be

notified.) The mother can add the alleged father’s name to the registry, too. After Vital Records receives the VAP or order of parentage, the man is listed as the legal father.

If the DNA test results show non-paternity, then he can file a written revocation to nullify the notice of intent to claim parentage. Revoked or not, the notice of intent to claim parentage can be “introduced in evidence by any other party, other than the person who filed such notice, in any proceeding in which the parentage of a child may be relevant, including proceedings seeking payment of child support, medical payments on behalf of the child or any other payments, or that may involve the payment of damages involved in connection with such parentage.”

Terminating Child Support for Non-Paternity

He believed he was the father, but recent genetic test evidence shows non-paternity. What then?

There are two points to the spear. First, the obligor will want to terminate his child support obligation prospectively. Is that possible? Yes. The court may relieve the obligor from a final legitimation order pursuant to Tenn. R. Civ. P. 60.02(4) because prospective child support is no longer equitable once non-paternity has been proved.

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Second, the obligor will want to recover some or all past support payments. Is that possible? No. Reimbursement of past child support payments is prohibited by *Tenn. Code Ann.* § 36-5-101(f) (1) as a retroactive modification of child support.

Alternatively, the obligor may sue the actual biological father for restitution to recover necessities paid on the child's behalf ("appropriate food, shelter, tuition, medical care, legal services and funeral expenses..."). Lawsuits to recover payment of necessities provided to a minor child "sound in contract" and as such "must be commenced within six years after the necessities were provided." Furthermore, *Tenn. Code Ann.* § 36-2-306(a), a statute of repose, sets the outer limit of three years after the child's majority in which the obligor (not the biological father) can file a lawsuit to recover payment of necessities provided to a minor child from the legally responsible party (the biological father).

Retroactive Child Support

However paternity is established, the noncustodial father will likely be ordered to pay retroactive support. Although there is a strong presumption favoring retroactive child support in Tennessee, there are special circumstances.

Unless the court finds cause for deviation by clear and convincing evidence, both medical and child support will be ordered retroactive to the child's birth. The court considers three

deviation factors:

(11)(A)(i) *The extent to which the father did not know, and could not have known, of the existence of the child, the birth of the child, his possible parentage of the child or the location of the child;*

(ii) *The extent to which the mother intentionally, and without good cause, failed or refused to notify the father of the existence of the child, the birth of the child, the father's possible parentage of the child or the location of the child; and*

(iii) *The attempts, if any, by the child's mother or caretaker to notify the father of the mother's pregnancy, or the existence of the child, the father's possible parentage or the location of the child;*

Despite the presumption of retroactive support, best interests of the child standard and court's discretion in these matters, the father need not have been wholly unaware of the child's existence to avoid or reduce the amount of retroactive support. In *Burnine v. Dauterive*, retroactive support was forgiven because, when the child was an infant, the mother lied to the father telling him the infant had died.

The custodial parent may recover retroactive support after the child reaches adulthood. In *Lichtenwalter v. Lichtenwalter*, the Supreme Court held that the right to recover a "judgment for child support arrearage" lies with the obligee-parent to whom it was due. The right does not lie with the adult child not party to the action.

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Private Child Support Agreements

Parents may enter into child support agreements, but those agreements must comply with the guidelines and be court approved. The non-marital child’s right to support from the putative father cannot be contracted away by the mother to the child’s detriment.

In *Berryhill v. Rhodes*, the Supreme Court held “private agreements for the payment of child support violate public policy” and are void per se. The cure? The court must approve the private agreement. (In *Berryhill*, the mother collected monthly support per implied agreement with the putative father. Shortly after the child’s 18th birthday, the mother filed a paternity case seeking retroactive support calculated under the guidelines.)

This whole process — from conception to legal parentage to custody to support — should always begin with DNA testing.

When the client arrives at the family lawyer’s office, no matter what the status, make sure genetic testing is done. And test twice. III

NOTES

1. Although outside the scope of this research, there seems to be no reliable published statistics on the likelihood of false positives for paternity testing. Seeking a second paternity test seems to be a practical response to mitigate this risk. For purposes of this article, paternity testing, genetic testing and DNA testing mean the same thing.

2. Cleveland Clinic. “DNA Paternity Test.” <https://my.clevelandclinic.org/health/diagnostics/10119-dna-paternity-test> (last visited Sept. 19, 2023).

3. *Brooks v. Andrews*, W2021-00106-COA-R10-JV (Tenn. Ct. App. 2021).

4. *Tenn. Code Ann.* § 36-6-301.

5. *Tenn. Code Ann.* § 36-2-305.

6. *Id.*

7. “Average exclusion probability is a measure of efficiency in paternity testing; it refers to the a priori ability of a battery of tests to detect paternity inconsistencies.” *Probability of Exclusion in Paternity Testing: Time to Reassess*, by L.O. Cifuentes, E.H. Martinez, M.P. Acuna, H.G.

Jonquera; *Journal of Forensic Sciences* (2006); <https://pubmed.ncbi.nlm.nih.gov/16566769/> retrieved Oct. 24, 2022.

8. *Tenn. Code Ann.* § 36-2-304(a)(5).

9. *Tenn. Code Ann.* § 36-2-310.

10. *Tenn. Code Ann.* § 24-7-112.

11. *Tenn. Code Ann.* § 24-7-112(b)(1)(B).

12. *Tenn. Code Ann.* § 24-7-112(b)(2)(C).

13. *Tenn. Code Ann.* § 36-2-311.

14. *Tenn. Code Ann.* § 36-6-219. See *Brooks v. Andrews*, W2021-00106-COA-R10-JV (Tenn. Ct. App. 2021).

15. *Tenn. Code Ann.* § 36-2-302(1).

16. *Tenn. Code Ann.* § 36-2-303.

17. *Tenn. Code Ann.* § 36-2-304(a).

18. *Troxel v. Granville*, 530 U.S. 57 (2000).

19. *Tenn. Code Ann.* § 36-2-304(a).

20. *Tenn. Code Ann.* § 36-6-101(a)(1).

21. J.L. Richards, 1 *Richards on Tennessee Family Law* § 8-2, p.321 (Matthew Bender, Third Ed.).

22. *In re M.J.H.*, 196 S.W.3d 731, 747 (Tenn. Ct. App. 2006).

23. *Tenn. Code Ann.* § 36-6-101(d).

24. *Tenn. Code Ann.* § 36-6-106(d).

25. *Tenn. Code Ann.* § 36-6-106(a).

26. *Hodge v. Craig*, 382 S.W.3d 325 (Tenn. 2012); unanimous decision recognized intentional misrepresentation of paternity as actionable and damage award was not retroactive modification of child support. See also 8 Tenn. Prac. Pattern Jury Instr. T.P.I.-Civil 8.36 (2022 Ed.), first comment which reads, “Intentional misrepresentation, fraudulent misrepresentation, and fraud are different names for the same cause of action.” Citing *Hodge v. Craig*, 382 SW3d 325, 342 (Tenn. 2012).

27. *Tenn. Code Ann.* § 24-7-113(c).

28. *Tenn. ex rel. Kimberly C. v. Gordon S.*, No. M2019-01499-COA-R3-JV (2020).

29. Eg. *Jones v. Tennessee*, W2006-00540-COA-R3-JV (2006).

30. *Tenn. Comp. R. & Regs.* ch. 1240-2-4-.06(1).

31. *Tenn. Code Ann.* § 36-5-2201(a)(7).

32. *Tenn. Code Ann.* § 36-2-318(g,h).

33. *Richards v. Read*, No.01A01-9708-PB-00450, 1999 Tenn. App. LEXIS 495 (Tenn. Ct. App. July 27, 1999).

34. *Tenn. Atty. Gen. Op.* 131 (2006). Aug. 15, 2006. www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2006/op06-131.pdf

35. *Peychek v. Rutherford*, W2003-01805-COA-R3-JV (Tenn. Ct. App. 6-8-2004).

36. *Hooper v. Moser*, M2001-02702-COA-R3-CV (Tenn. Ct. App. 10-22-2003).

37. *Tenn. Code Ann.* § 36-2-311(a)(11)(A).

38. No. W2010-02611-COA-R3-JV, 2011 Tenn. App. LEXIS 406 (July 27, 2011).

39. 229 S.W.3d 690, 694 (Tenn. 2007).

40. 21 S.W.3d 188 (Tenn. 2000).

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